FJC Directions

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To Our Readers

This issue of *Directions*, which is devoted entirely to the development and use of alternative dispute resolution in the federal courts, grew out of a conference held for federal judges in late 1993. The purpose of the conference, which was cosponsored by the Federal Judicial Center, the Center for Public Resources, the ABA Litigation Section, and the Harvard Law School, was to help judges understand the issues they and their courts are likely to confront when they authorize use of ADR in their districts. Attendance at the conference was limited to one judge from each of the ninety-four districts. Through panel presentations and small-group discussions, the conference provided participants with information and skills to help them make sound decisions about whether and how to implement ADR in their courts.

This publication does the same for a larger audience. A single volume cannot, however, present all the information shared in a one-and-a-half-day conference, and therefore we have had to make some choices. Although a fair amount of conference time was spent describing the various ADR processes, such as mediation and arbitration, we have chosen not to include such information in this issue because it is very well covered by the *Judge's Deskbook on Court ADR*, which was prepared for the conference. Through special arrangement with the Center for Public Resources, the Federal Judicial Center has copies of the *Deskbook* available for distribution to the federal judiciary from its Information Services Office. (The general public may buy copies from the Center for Public Resources, 366 Madison Ave., New York, ny 10017, tel. 212-949-6490, fax 212-949-8859.)

Rather than duplicate material in the *Deskbook*, this issue of *Directions* acquaints the reader with the context in which ADR is developing and with the questions it raises, from the broadly institutional—for example, Judge Hornby's article on the role of courts and Professor Menkel-Meadow's discussion of some of the questions of professional ethics raised by ADR—to methods for referring individual cases to ADR as described by Judge McKeague.

The issue also sets the context in which today's ADR questions arise by defining the principal types of ADR used in the federal courts and recounting the history of their growth and their current status under the 1990 Civil Justice Reform Act. An interview with ADR administrators in the district courts for the District of Columbia and the Northern District of California shows how everyday practical problems often raise important policy questions, and following the interview we document the development and emerging role of ADR administrators in eight courts. The practical problems associated with evaluating and monitoring ADR procedures are set out in another article. A point–counterpoint by District Judge William R. Wilson, Jr., and Magistrate Judge Wayne Brazil on mandatory arbitration addresses threshold concerns for many courts considering the design of appropriate dispute resolution procedures.

The articles here, though based on presentations and discussions at the conference, were written especially for *Directions*. They were conceived and edited by Center staff members Kay Loveland of the Publications & Media Division and Donna Stienstra of the Research Division. The Center is grateful to the authors and editors for helping to bring some of the issues considered at the conference to a wider audience, and hopes *Directions* readers will find the exchange of views as stimulating as the conference participants did.

ADR and the Federal Courts: Questions and Decisions for the Future

william w schwarzer

At least since Roscoe Pound's historic address in 1906 on the Causes of Popular Dissatisfaction with the Administration of Justice, political and professional leaders have railed against cost and delay in the resolution of disputes, and for as long as the problem has been named, there has been a search for its causes. Courts, attorneys, litigants, Congress, and the very nature of our society have all been blamed. Looking back from the perspective of history and comparing our present justice system to the English common-law courts and to pre-Federal Rules practice in the United States, it is easy to place the blame on a tradition of excessive and irrational attachment to procedural technicalities.

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But the perspective changes when one looks at the present rather than the past—when one considers current proposals for reform rather than those that have acquired the respectability that comes with age. Inevitably, any proposal for procedural reform encounters opposition founded on perceptions of due process, fairness, and equality. Every procedural change has an impact on the relationship of parties to the dispute resolution process, and so there are bound to be different perceptions about who are the winners and who are the losers.

So it is with alternative dispute resolution. The judgment of history remains shrouded in the future. But without the benefit of historical perspective, ADR must stand or fall on its own merits. That makes it incumbent on those with responsibility for dispute resolution to seek answers and to develop the facts. To do that we must know what questions to ask.

Though there are many questions about ADR—and I will touch on some of them below—there is strong support for the general proposition that people with disputes should have alternatives for the resolution of those disputes. Speaking about the demands growing caseloads are placing on the federal district courts, the Chief Justice recently noted that the future may require dramatic changes in the way disputes are resolved. One model he described "posits that many litigants may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable and tardy one, however close to perfection."

A strong perception of such a need is reflected in a 1992 survey of federal judges conducted by the Federal Judicial Center. For example:

- 66% of district court judges disagreed with the proposition that courts should resolve litigation through traditional procedures only;
- 86% disagreed with the proposition that ADR should never be used in the federal courts;
- 56% thought that ADR should be used in the courts because in some cases it produces fairer outcomes than traditional litigation; and
- 86% thought that the role of the federal courts should be to assist parties in resolving their dispute through whatever procedure is best suited to the case.

We know as well that authorization for ADR, either through local rules or Civil Justice Reform Act plans, has grown rapidly in the federal district courts over the past several years and that the litigation environment is more sympathetic to ADR today than just a few years ago.

What is the purpose of ADR, and how do we measure its effects?

But important questions remain, and one of the most fundamental asks, "What is the purpose of ADR?" It is easy enough to say that it serves the ends of Rule 1 of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive" resolution of every dispute. But why ADR prodedures instead of more limited variations in traditional litigation processes? Does ADR simply offer convenient methods for dealing with heavy caseloads? Do ADR procedures reflect a failure of the courts to solve their own problems of providing civil justice? Or is ADR itself an appropriate solution for those problems? Do ADR procedures perhaps offer even superior methods for resolving some disputes by delivering outcomes that are not only less expensive and more timely but also more satisfactory to the parties?

The answers to these questions may vary with the perspective of the questioner. Approaching ADR from the point of view of courts confronted with docket problems may lead

to different answers than approaching it from the point of view of the litigant seeking a dispute resolution method appropriate for his or her particular case. So we must ask: What is the proper balance between public and private interests, between enabling the courts to provide justice in all cases and meeting the needs of individual litigants for timely and just resolutions?

Achieving the optimum balance requires, as a first step, examining and understanding the effects of ADR. We need to ask:

- Does ADR lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs?
- Does ADR improve access to justice for those who are not well off and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant?
- What are the trade-offs between the advantages of ADR—such as privacy, speed, and reduced adversariness—and the advantages of traditional adjudication—such as vindication, comprehensive relief, and precedent?
- Does ADR lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish the opportunities for adjudication?
- Does ADR lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities?[1]

In addressing such questions, we need to move beyond generalizations and facile assumptions and try to learn the facts.

There is still a surprising dearth of information about the process of resolving disputes, either by traditional means or by the procedures we call alternatives. We know little, for example, about the comparative cost and time effects of different forms of ADR and the traditional litigation process. We also know little about what litigants are seeking when they come to court; what prompts some litigants and not others to consent to ADR; what litigants value and what satisfies them. Much remains to be learned about assessing the effects of ADR. To begin with, we need to determine *what* we should be measuring. We have data, for example, on participant satisfaction, but we need to know what other indicia we should consider and what weight they should be given. By what standards should one measure the success of ADR? This, of course, brings us back to the question of the purpose of ADR; by defining the purpose, one also defines the criteria for measuring its effects.

Of course, speaking of ADR in generic terms does not advance our understanding very much. There are a variety of ADR programs, both voluntary and mandatory, and the choice between them is a crucial issue. ADR includes mediation, arbitration, early neutral evaluation, and summary jury trials, among others. These programs are not interchangeable, and relevant questions must be asked for each type.

The courts—both as individual courts and as an institution—confront a series of challenges as they consider and adopt ADR procedures. One is to select in each particular case a procedure appropriate to the needs of that case. It is here that the close link between ADR and case management becomes visible. One judge recently told us, "You can't do good ADR without good case management." Another responded, "You can't do good case management without good ADR." So at the nuts-and-bolts level, a recurring question is whether ADR will advance sound management in the particular case, which type of ADR will be most useful, and how it can be most effectively integrated into a judge's or court's overall case-management program.

Decisions about ADR compel us to answer fundamental questions

Dealing with all these questions requires an understanding of ADR processes and their relationship to civil justice. Like the National ADR Institute for Federal Judges, this issue of *Directions* does not advocate ADR. Rather, we hope to further understanding by examining questions such as those I have raised here.

The articles that follow can help all of us think more clearly about ADR and enhance the ability of courts to make informed decisions about the use of ADR, to create sound programs where programs are appropriate, to make wise choices about referral of cases to ADR, and to further the effective use of ADR by counsel and parties. The hope is to foster the optimum, not necessarily the maximum, use of ADR for those courts that choose to implement it.

As you read the articles that follow, consider the context in which ADR has gained a significant role—a time in which courts find themselves under great pressure as well as close scrutiny. The circumstances that have driven the development and spread of ADR compel us to address the fundamental question: What are the courts for? We cannot think about ADR without also thinking about the role of the federal courts and federal judges and the values we associate with this institution—all in all, a daunting challenge but also an opportunity for self-examination and creative response.

Notes

1. A forthcoming Center publication will examine this issue. The paper, by Donna Stienstra and Thomas Willging, is part of a series in support of the judiciary's long-range planning efforts. It will lay out the arguments for and against court-based ADR.

ADR in the Federal Trial Courts

donna stienstra

Alternative dispute resolution is an increasingly frequent topic of discussion among those who work and practice in the federal trial courts. This may give the impression that ADR has sprung suddenly onto the federal court stage and has become the lead player in the drama of civil justice reform. However, though there have been substantial developments in federal court ADR in the last several years, the idea of alternatives to litigation is neither novel nor especially recent in federal courts. Nonetheless, its heightened visibility has prompted many questions about the nature and status of ADR in the federal courts. How much ADR is there? What kinds of ADR is one likely to encounter? How many courts have presumptively mandatory ADR? There are answers to these questions, but because ADR in the federal courts is very much in flux, the answers may be quite different next year than they are now. In some courts, for example, ADR procedures are available where none where provided only a year ago. In other courts, programs once thought well established are taking on new characteristics as experience suggests a need for change. In the federal courts, both the number and the nature of ADR is rapidly evolving. Nonetheless, for the moment we'll freeze the picture and describe the current state of ADR in these courts.

Defining federal court ADR and the ADR process

Four primary forms of ADR are most commonly found in federal courts: arbitration, mediation, early neutral evaluation (ENE), and summary jury trial. They are called "alternatives" because they provide a dispute resolution process different from the traditional litigation process. Although often thought of as alternatives to trial, ADR procedures are in reality (given the very small percentage—under 5%—of cases that are tried) primarily alternatives to traditional forms of pretrial dispute resolution. Rather than replacing trial, they are more likely to replace last-minute settlements.[1]

In the federal courts, cases become subject to ADR through a variety of mechanisms. In some courts, some types of cases are automatically referred to ADR at filing or when some other triggering event occurs. Such ADR programs are often referred to as mandatory, although they are more accurately described as presumptively mandatory, since each permits cases to be removed from ADR according to specified criteria and procedures. Judge and party discretion are confined for the most part to this removal process.

In contrast to the presumptively mandatory ADR programs, other courts leave participation in ADR almost entirely to the discretion of the parties. These programs are generally called voluntary programs, and they come in at least two forms: those that order specified categories of cases into the ADR process and then permit unquestioned opt out and those that rely solely on voluntary opt in. In both, however, the discretion remains with the parties.

A third, less visible method—perhaps because it has no handy label—is referral to ADR by order of a judge. Courts that authorize such referrals lodge discretion to use ADR with the judge, who is given substantial authority over application of the ADR process to individual cases.

Regardless of the method by which a case enters ADR, in all federal court ADR programs, the outcome is nonbinding unless the parties agree to be bound. Thus, *mandatory* and *voluntary* describe only *how* cases enter an ADR program, not what happens during ADR or the type of outcome reached.

Referrals to ADR take place in an administrative context that varies greatly from court to court. Some courts provide court-based—or court-annexed—ADR programs (though without precise definition, these terms have become part of the everyday vocabulary of ADR). In reality, because court provision of ADR services comes in many forms, the administrative structures used defy easy categorization or precise definition. The clearest manifestation of what is often referred to as a court-based ADR program is one in which the court, rather than a private company or other entity outside the court, provides and manages the ADR services. In such a program, the court typically creates a roster of neutrals (usually attorneys but sometimes magistrate judges) who conduct the ADR session. The court establishes criteria for inclusion on the roster, including training requirements, and adopts rules regarding such matters as case selection, confidentiality guarantees, and guidelines for conducting the ADR session.

In clearest contrast to such a program is the court that authorizes judges to refer cases to ADR or encourages parties to use ADR but provides no roster of neutrals and has no formal rules for the ADR process. In such a court, responsibility for locating an ADR provider and establishing the procedural parameters for the ADR process lies with the judge and the parties. In between the "court-based" and the "freelance" are other variations (for example, courts that rely on rosters of neutrals managed by local bar associations or state courts). Each type of administrative structure has advantages and disadvantages for courts and judges, as Professor Menkel-Meadow discusses in another article in this issue.

Four principal ADR processes are used in federal courts. Different benefits are claimed for each, and commentators have raised concerns about each. For a useful discussion and reference guide, see Center for Public Resources, Judge's Deskbook on Court ADR (1993), from which this outline is adapted. As referenced on page 1 of this issue of *Directions*, copies are available to federal judges from the Federal Judicial Center (the general public may buy copies from the Center for Public Resources).

Court-annexed arbitration is a dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing. The arbitrator's nonbinding decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and request a trial de novo in district court. If they do not request trial de novo and do not attempt settlement, the arbitrator's decision becomes the final, nonappealable decision.

Mediation is a flexible, nonbinding dispute resolution process in which an impartial neutral third party—the mediator—facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.

Early neutral evaluation (ENE) is an ADR process that brings all parties and their counsel together early in the pretrial period to present summaries of their cases and receive a nonbinding assessment by an experienced neutral attorney with subject-matter expertise. The evaluator also provides case planning guidance and, if requested by the parties, settlement assistance.

Summary jury trial (SJT) is a flexible, nonbinding ADR process designed to promote settlement in trial-ready cases headed for protracted jury trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which the evidence is presented by counsel in summary form. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations.

Other court ADR processes are

- summary bench trial
- court minitrial
- Michigan "mediation" (similar to arbitration)
- multidoor courthouse
- settlement week
- special masters
- case valuation.

Development of ADR in the federal courts

The first formal recognition of alternatives to litigation was stated in the 1983 amendments to Fed. R. Civ. P. 16, which provided for the use of "extrajudicial procedures to resolve the dispute," but this language simply acknowledged developments already under way. Several years before the rule change, a number of federal courts had begun experimenting with ADR in the form of mediation and nonbinding mandatory arbitration programs.

In 1978, pursuant to a Judicial Conference program, three district courts implemented mandatory arbitration, which required parties in cases that met certain criteria to participate in arbitration unless they could show why it would be inappropriate for the case.[3] Two of these courts became part of a group of ten experimental arbitration courts established in the mid-1980s. Congress gave formal statutory authorization to these courts in 1988 and at the same time authorized ten additional courts to offer, but not compel, arbitration.[2] Between the mid-1970s and mid-1980s, a number of courts also developed mediation programs, Judge Thomas Lambros in Ohio Northern invented the summary jury trial, and the Northern District of California created the first early neutral evaluation (ENE) program.

Even without enactment of the 1990 Civil Justice Reform Act, it is likely that ADR would have continued to develop in the federal courts, as it has in the state courts and private sector, but the Act's passage almost certainly quickened the pace of ADR adoption in the federal courts. In its list of six desirable principles of case management, the CJRA includes "authorization to refer appropriate cases to alternative dispute resolution programs." The Act requires ten "pilot" courts to include such authorization in their cost and delay reduction plans and instructs all other district courts to "consider" such authorization. In addition, the CJRA instructs three "demonstration" districts to experiment with ADR.

An initial examination of the courts' CJRA plans reveals that at least two-thirds of the courts now authorize one or more forms of ADR. For some courts this authorization is simply a statement in the plan that judges and parties are encouraged to use ADR, including mediation, ENE, and any

other ADR procedure deemed appropriate for the case. Other plans provide detailed procedural rules for specified types of ADR and reveal an intention to set up an administrative structure to support judicial and party selection of ADR. Perhaps as many as a third of the district courts, including the pilot arbitration courts authorized by statute, have in place or intend to establish court-based programs that provide at least one type of ADR.[4]

The most common form of ADR authorized by the courts is mediation. More than fifty courts, by initial count, authorize its use, with some relying on attorney mediators and others on magistrate judges. For at least a half-dozen courts, referral is automatic by case type or other objective criterion. An additional twenty or so courts authorize individual judges to order parties to mediation.

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Around thirty courts authorize use of arbitration, including the twenty with statutory authority. Mandatory referral by case type or category is used only by the courts authorized by statute to use this method, but several additional courts authorize judges to order parties in individual cases to arbitration.

Nearly twenty courts authorize use of the federal courts' newest form of ADR, early neutral evaluation. Several provide for automatic (or mandatory) referral by case type or category, and several authorize judges to order parties to use ENE, with the remaining half leaving its use to the parties.

Altogether, more than two-thirds of the courts authorize at least one form of ADR and at least a third authorize more than one form. To what extent authorization will be reflected in use, and whether the amount of ADR authorized in each court's CJRA plan represents a minor or substantial change from past practice, is unknown at this point. It can be said with confidence, however, that ADR has expanded significantly in the federal trial courts since passage of the CJRA.

At the same time, we should keep in mind the many factors in addition to the CJRA that are moving courts toward adoption of alternative methods for resolving disputes, including the rapid development of ADR in state courts and the private sector and the bar's growing familiarity with ADR. The context in which the federal courts are now debating ADR's merits is very different from fifteen or twenty years ago. Among the numerous examples of growing receptivity to ADR are the five set out below.

- In 1990, the Federal Courts Study Committee recommended that Congress "eliminate any doubt that all federal courts may adopt local rules establishing dispute resolution mechanisms that complement or supplement traditional civil pretrial, trial, and appellate procedures" and "permit (but not require) district courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and court-annexed arbitration."
- Also in 1990, Congress passed the Administrative Dispute Resolution Act, which requires each agency to consider ADR for resolving disputes. A 1991 executive order also urges agencies to consider ADR as a method for improving civil justice.
- A November 1992 Federal Judicial Center survey of all federal district judges found that of the 80% who responded 66% disagreed with the proposition that courts should resolve litigation through traditional procedures only; 86% disagreed with the proposition that ADR should never be used in the federal courts; and 56% thought ADR should be used in federal courts because in some cases it produces a fairer outcome than traditional litigation.
- The Center for Public Resources, a not-for-profit organization established to publicize ADR, initiated a program in 1984 to seek corporate pledges to use ADR. By the end of 1993, almost 700 of the nation's largest companies and over 2,000 of their subsidiaries had signed. A similar program begun in 1991 to seek law firm pledges to counsel clients about ADR had garnered 1,500 signatories by the end of 1993.
- In 1993, the American Bar Association Standing Committee on Dispute Resolution became a full-fledged ABA section—the Dispute Resolution Section—established to promote responsible use of alternative dispute resolution methods.

These developments have been driven by a variety of goals and circumstances, among them a search for lower costs and quicker dispositions in civil cases, the changing economics of legal practice, demands imposed on judge time—particularly trial time—by a rising criminal caseload, and a conviction that ADR can, in some cases, provide a better process and a better outcome.

At the same time, a debate has recently arisen about the merits of mandatory court-based arbitration, the oldest of the federal court ADR procedures—and a distinctively different procedure from other types of ADR, in that it renders a decision. The context of this debate is the pending sunset in

December 1994 of the legislation that established the mandatory arbitration programs, 28 U.S.C. § 651–658. The Judicial Conference voted twice in 1993 to oppose legislation that would authorize all courts to adopt, at their discretion, mandatory arbitration programs.[5] And in a resolution adopted in August of this year, the ABA voted not to support expansion of mandatory arbitration to other federal courts.

While these decisions suggest there is doubt about mandatory arbitration, acceptance of voluntary arbitration appears to have grown under the CJRA (see the previous section) and overall there has been substantial incorporation of ADR into the dispute resolution process, both inside and outside the courts, in the past several years.

Looking ahead

The changing environment of dispute resolution presents federal courts, individual judges, the Judicial Conference, and Congress with many questions about the role of ADR in trial courts and the implementation of programs that not only provide satisfactory procedures for litigants and courts but also protect important rights. These questions range from the mundanely practical to the ethically tangled. Among them are these:

- Should participation in ADR always be voluntary, or are there circumstances in which courts or individual judges should be permitted to compel participation?
- For what types of cases is ADR appropriate? Should some types of cases be excluded from ADR?
- Should the court provide ADR services or should it refer parties to private providers? In either instance, what is the appropriate relationship between the court and the ADR neutrals?
- What are the effects of each type of ADR on the costs of litigation? On court calendars? On litigant and public satisfaction with the courts?
- What are the administrative, budgetary, and training requirements of quality ADR programs?
- What procedural rules and guidelines are needed to ensure sound and ethical application of ADR? (For example, what does it mean to promise confidentiality?)
- To what degree should the court assume responsibility for establishing and enforcing training, ethical guidelines, and so forth for neutrals?
- How will adoption of ADR change the role of the courts and the judge?
- What are the implications, if any, of ADR for the Seventh Amendment right to a trial by jury?
- What are the consequences of suspending the rules of evidence in cases referred to ADR?

Courts began the process of answering these questions as they considered their responses to the directives of the CJRA. Now, as the work of implementation proceeds, more questions will arise, new or better answers will emerge, and both individual courts and the court system will continue, by design and undoubtedly by happenstance as well, to fashion the dispute resolution methods of the future.

Notes

1. Because ADR is defined in contrast to "traditional" litigation, the judge-hosted settlement conference—a long-standing component of the traditional process—is often not considered a form of ADR. In the present discussion, we follow this distinction, recognizing that categorization is problematic because neither *adr* nor *traditional adjudication* has a firm definition. The best approach may be simply to drop the alternative–traditional distinction and think instead about the variety of procedures that resolve cases.

2. 28 U.S.C. §§ 651–658. Authorization for the arbitration courts expires at the end of 1994 unless Congress acts to extend it. The Judicial Conference has voted to support continued authorization for the current twenty programs and extension to all courts of authority to adopt voluntary, but not mandatory, arbitration programs. Report of the Proceedings of the Judicial Conference of the United States, March 16, 1993, Washington, D.C., at 12; Report of the Proceedings of the Judicial Conference of the United States, Sept. 20, 1993, Washington, D.C., at 45.

3. *See* Report of the Proceedings of the Judicial Conference of the United States, March 9–10, 1978, Washington, D.C., at 6.

4. This information and that reported in the following paragraphs was compiled at the Federal Judicial Center and is based on a review of the CJRA cost and delay reduction plans and a survey sent last fall to the district courts. Readers should treat the numbers reported here as preliminary, since the information provided in both the CJRA plans and the surveys is sometimes ambiguous due to the varying ways in which such terms as mediation, mandatory, and so on are used. The Center is currently verifying the information and, in cooperation with the Center for Public Resources, is compiling it into an ADR sourcebook. The sourcebook will provide a court-by-court summary of the forms of ADR adopted by the federal courts and will provide detailed information about the requirements of these programs and how they are administered.

5. *See* note 2.

Judicial Referral to ADR: Issues and Problems Faced by Judges

carrie j. menkel-meadow

Use of ADR techniques in federal courts raises a host of practical, ethical, and jurisprudential issues about the role of judges and the function of courts in case management, settlement, and adjudication.[1] With increased ADR usage and experimentation resulting from implementation of civil justice expense and delay reduction plans under the CJRA, these issues must be faced by more and more judges, court administrators, lawyers, and parties. Judges, in particular, must confront the key question of what their role should be in referring lawyers, parties, and cases to a process other than the "usual," i.e., adjudication. (Of course, we know that for over 90% of civil cases the "usual" is not adjudication, but a negotiated settlement or other form of case disposition.)

In this article, I discuss three core issues faced by judges and courts who refer cases to ADR: selecting cases for ADR, providing ADR neutrals, and managing cases that have been referred to ADR. These issues may vary by the way a court designs its ADR program—specifically, whether issues are addressed at the level of courtwide policy, whether the court has full-time staff assigned to ADR functions, or whether ADR decisions are left to the individual judge. Each court will have to decide whether to leave these questions to individual discretion or to craft courtwide policy to deal with them systematically and in advance of their occurrence. No matter which approach courts take, it is likely we will soon begin to see a "common law" of ADR as individual judges face questions of interpreting local rules and practices and making decisions about these difficult issues.

Selecting cases for ADR

When a court authorizes ADR, someone must decide which cases will be selected for these procedures. In some respects, the easiest—though not necessarily cheapest—way to deal with the selection question is to assign cases to an ADR process by some objective criteria, such as case type or amount in controversy. With this method, decisions about which types of cases belong in which type of process are dealt with by court policy, and neither judges, ADR staff, clerks, nor parties need to exercise discretion.

The downside of this approach is that unless there is an "opt-out" or "opt-in" procedure, there is little individual assessment of which processes might be better for particular case types or litigants. Cases are referred without considering whether the presence of certain legal issues, lawyers, or clients might suggest use of a particular process or might indicate that ADR will not be productive—as might be the case, for example, in a dispute involving some large bureaucratic organizations or a hotly contested policy or factual issue.

In courts where selection is not made by objective criteria, individual judges—or, in some courts, ADR staff—must address the difficult threshold question of whether any given case should be referred to ADR. There are no clear answers to this seemingly simple question. Some believe that certain factors clearly militate in favor of or against ADR, and in favor of or against particular forms of ADR.[2] For example, some argue that when an important or unsettled legal issue, such as basic liability in some mass torts cases or constitutional challenges to state programs, is at stake, ADR should be avoided in favor of an authoritative ruling. Others suggest that ADR is not likely to be effective when the parties have had an especially antagonistic relationship (though others argue that ADR can actually diffuse hostility and facilitate more productive relationships, at least for the duration of the lawsuit).

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Similar arguments are made on behalf of particular forms of ADR. It is often suggested, for example, that when parties have a long-term relationship, mediation is the appropriate process because preservation of the relationship may need to be addressed along with the dispute. Arbitration is often seen as the preferred process in cases involving monetary damages and stakes that are so modest as to make high litigation costs particularly burdensome.

While efforts to establish objective criteria for case selection—such as amount in controversy, intensity of fact disputes, need for expert testimony, extent of discovery—have some merit, there are often factors present that are not easy to evaluate, such as the relationship between the parties or

their attorneys or the parties' ability to pay for the ADR service.[3] Thus, when the decision about appropriate use of ADR is left to the individual judge, he or she must decide how much reliance to place on characteristics discoverable from the case file or whether, instead (or in addition), to rely on individualized judgments based on an in-person pretrial conference.

In courts that rely on the exercise of individual judicial discretion, judges must also decide what role the parties and attorneys will play in determining whether and how ADR will be used. Some may wish to leave these decisions entirely to the parties and their lawyers, while others will prefer to restrict these decisions to a district judge or magistrate judge, who may have developed specialized expertise. Obviously, party choice and voluntariness will be more likely to shield the ADR assignment from subsequent challenge or appeal.

A number of other questions also face the judge who must decide about ADR referrals on a case-by-case basis. Should the parties' ability to pay affect the form of ADR the judge recommends? What should the judge do if he or she senses unequal bargaining power, financial resources, or competence of counsel? At what stage in the litigation should ADR be recommended? When should a case be removed from ADR?

Since courts, attorneys, and parties may all have different interests, any judge making an assessment of suitability for ADR will have to consider whose goals are being furthered—the individual judge's docket-clearing goals, what is most fair for the case, party desires for quick or authoritative rulings, or attorney preferences for what is familiar and income-producing. Concern for the public interest may also be a factor in these decisions, involving issues ranging from efficient use of public funds to access to information about cases where important public values are at stake.

Providing neutrals for cases selected for ADR

When a court authorizes use of ADR, the court or its individual judges must address two basic questions in selecting ADR neutrals. First, how can the court ensure the quality of court-assigned neutrals—for example, with its own training and certification program or by relying on résumés or experience? And second, how should neutrals be assigned to cases?

Some courts answer the first question by establishing a court-approved roster from which parties or the judge may select a neutral. Although a seemingly straightforward method for providing ADR services, establishing such rosters raises important issues for judges. For example, what role should the judge play in screening applicants for the roster? If a regular corps of neutrals serves the court, what relationship is appropriate between the judge and these providers? Does establishing a select group of neutrals from the local bar create a favored class of lawyers with special access to the court's judges?

If a roster is established, questions arise about the court's responsibility for the performance of the neutrals it selects. What role should the court play in ensuring that the providers on whom it has placed its imprimatur perform ably and ethically? What protections does it owe parties referred to ADR—particularly parties compelled to use ADR? On the other hand, what protections should the court provide to the neutrals who serve the court? For example, courts offering ADR services on a regular basis will have to decide whether neutrals are acting in a quasi-judicial capacity and whether to create equivalents of judicial immunity for them.[4]

In courts without an officially sanctioned roster, a judge who wishes to refer a case to ADR can ask the parties to find an ADR provider or can select a neutral from the burgeoning private sector of ADR providers. Referrals to private providers raise a number of problems, including perceptions of—if not the existence of—elitism, improper connections to courts, patronage, and conflicts of interest. Can a judge refer a case to his former law partner who is now an experienced private mediator? Can a publicly financed court refer parties to an ADR provider who charges for her services? Should the parties' ability to pay affect the selection of the neutral? Should judges compel participation if the parties must pay a fee for the service? Should the selection be made on the basis of process expertise or substantive expertise? If parties choose a private ADR provider at the court's behest, is the ADR court-annexed or private?[5]

The use of non-judicial ADR providers in court programs engenders significant questions about just what are the "core" adjudicative functions. As debates about the appropriateness of ADR in the courts make clear, some judges resist even recommending ADR.[6] Important issues of equity and uniformity are implicated if different judges within a court or different courts within a system follow different guidelines regarding whether and when to refer parties to ADR and to what kind of ADR. Even if a referral to ADR is accepted practice, questions remain about how much "persuasion" a judge may use to induce parties to try ADR.

In all court ADR processes, the judge's role as an ancillary or principal in the process can also become an issue. In many courts the judge may be the "ADR neutral" if mandatory settlement conferences are conducted with private caucuses and strong settlement suggestions. Although this is a common and controversial practice, judges need to be sensitive to how this role is performed and how parties and counsel view the legitimacy of the process. The issues are

more subtle when a judge has informal contact with a third-party neutral (at bench–bar conferences, in other matters, etc.) or when a judge formally appoints a master or other third-party neutral and has ongoing contact with that person. For example, what should a judge do if a party or the master seeks a ruling on a legal issue (such as an evidentiary question) during a pending ADR? Neither current judicial codes of conduct nor ethical guidelines for third-party neutrals clarify the standards by which judges and ADR providers should govern their behavior.[7]

Managing cases referred to ADR

Once a case has been referred to ADR, the judge faces a number of other issues. Some involve scheduling and monitoring the case's progress. Should discovery be tolled or continued during the ADR process? Who should make this decision, the judge assigned the case, the third-party neutral, or the parties and their counsel? Should these decisions be made on a case-by-case basis or by "uniform" local rule?

Other questions involve preparation for and participation in the ADR session. What should parties be required to prepare for an ADR proceeding? Who can be ordered to attend ADR sessions? (Many local rules now require someone with "authority to settle" to appear at settlement conferences or other ADR proceedings.) When does refusal to participate in an ADR proceeding become a sanctionable activity? What should be done about parties who use ADR proceedings either as "free" discovery devices or to delay proceedings? How should requests for public access to ADR sessions be handled? Again, should these decisions be made by the judge who refers the case to ADR, by the third-party neutral, by local court rules, or by the parties?

Among the most difficult issues a judge must face after referring a case to ADR is the appropriate relationship with the neutral who is handling the case. If difficult legal, discovery, or "behavior" issues—like good faith participation or Rule 11 motions—develop during an ADR proceeding, what should be the relationship of the ADR provider to a judge who may have to rule on such issues, perhaps while the ADR proceeding is pending? Some courts, such as the District Court for the Northern District of California and the U.S. Court of Appeals for the D.C. Circuit, have developed formal procedures or assigned specific personnel—for example, a judge not assigned to the case or the ADR administrator—to deal with such issues. However, this solution may raise questions about honoring the rules, contracts, and representations made by the court that all proceedings within an ADR process will remain confidential—subject, of course, to other laws and rules that might require disclosure in some limited circumstances. (In federal civil matters there are very few such exceptions to confidentiality, but third-party neutrals may have some independent legal duty to reveal instances of fraud, physical abuse, and in some cases, the terms of settlements.) Will an ADR program's credibility be questioned if a neutral has easy access to a judge to discuss the inner workings of an ADR procedure? If third-party providers promise confidentiality and parties reveal "needs or interests" facts, such as financial information, trade secrets, and so forth, in the course of an ADR proceeding, can this information then be deemed discoverable or admissible in adjudication proceedings?[8]

When courts have not developed formal procedures for handling matters that arise once a case has been referred to ADR, individual judges or other court personnel must decide how to monitor ADR efforts and how to resolve difficult issues that may develop during the ADR process. Some issues will inevitably be decided by individual judges, facing particular problems, creating a common law of ADR as courts interpret both uniform and local court rules and practices.

Whether decisions on these and many other issues are made by court policy or individual judges, the decision-making process can often be aided substantially by information about how the ADR process is working. This raises the question of how ADR programs should be evaluated and monitored, which involves not only the training and evaluation of particular individual ADR providers, but also evaluation of the effects of a whole ADR system. One of the reasons current evaluation studies have proved so inconclusive is that different participants in the judicial system have different goals.[9] For example, the costs and benefits for individual litigants—such as a chance to tell the "full" and not necessarily legally relevant story—may not be the same as the costs and benefits for the system. Thus it is important that evaluators consider carefully what questions they want to address.

With all these difficult issues, why refer cases to ADR?

Given all the difficult issues raised by court referral to ADR, many judges would prefer to avoid deciding when a case should undergo other than the "usual" process. For judges who prefer to remove themselves from this form of discretion, there are two simple solutions: a courtwide program that removes most, if not all, judicial discretion, or a party-initiated choice system. The latter is often considered the most consistent with our party-initiated litigation system. Yet we should stop and ask what is gained by court or judge involvement in the ADR referral and, then, how the difficult issues can be dealt with.

ADR is potentially useful as a cost and delay reduction mechanism for some courts and some cases, if not all. (We still await the results of systematic social science reviews by

the Federal Judicial Center and the RAND Corporation of the ADR programs currently being used in the CJRA pilot and demonstration districts.) But even if ADR does not prove the magic answer to caseload and docket problems, and even given all of the difficult issues generated by court referral to ADR, there are compelling reasons to use ADR, at least in some cases. ADR can, for example, provide less binary solutions to legal disputes; it can preserve, where appropriate, long-term relationships; it provides for the involvement of more than "two sides"; it ensures confidentiality, where appropriate; it permits party control and participation in the process as well as the outcome; and it meets some demands for expert decision making. The merits of a case may often be discussed and dealt with in deeper and more thorough ways than traditional litigation can allow—e.g., "interests" or "needs" facts can be discussed and dealt with, whereas they might never be exposed in traditional litigation with its evidentiary and other rule restrictions. Settlement is often easier and more productive when more issues rather than fewer are available for trade. The traditional goal of narrowing issues for trial, for example, can increase the need to compete over issues and party resources, whereas a mutually satisfactory settlement is more often facilitated by expanding or increasing issues and resources. Thus ADR can serve the interests of quality and access as well as efficiency.

Left to their own devices, many litigants and their lawyers would continue to opt for what is most familiar—the traditional ways of litigating. Judges and courts can provide an important educational function by referring cases to ADR and advising both parties and lawyers who may not be aware of all of the "new" methods of dispute resolution. Judges and courts can also assist parties in choosing the appropriate process for the particular case. In doing so, they can increase access to the courts for all by providing both a greater quantity of choices (thus reducing the wait for each process) and the best-quality process for a particular dispute.

The federal courts of the future will need to develop a variety of dispute-resolution mechanisms to be responsive to the needs of the public and the increasing complexity of matters that will come to courts while assuring that the important constitutional and other protections of our civil justice system are not infringed. (Some ADR advocates might go so far as to suggest that in a complex age when many disputes have more than two sides, we should rethink some of the "old saws" that we believe are essential to our system, like two-party adversariness.)[10] If justice is about quality of solutions, as well as equal access and equity, then referral to what Professor Maurice Rosenberg has called a "forum that fits the fuss" is required. This means judges must be knowledgeable about what the different processes can offer and about how intelligent "triaging" of cases and parties to the "treatment" can best "cure" the problem. Like other issues raised by case management, referral issues can be dealt with by local rules, sound court administration, and flexible input by the users of the processes—judges, lawyers, parties, and court administrators. Judicial referrals to ADR raise serious questions, but none that cannot be solved by experience, evaluation, deliberation, and eventually, standards for the exercise of discretion.

Notes

1. For a review of the broader jurisprudential and policy issues, see, e.g., Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376 (1982); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485 (1985); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of adr,"* 19 Fla. St. L. Rev. 1 (1991).

2. *See* Frank Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an adr Procedure*, 10 Negotiation J. 49 (1994).

3. *See, e.g.*, Lisa Bernstein, *Understanding the Limits of Court-Connected adr: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. Pa. L. Rev. 2169 (1993) (arguing that court-annexed arbitration may not increase access to justice for poorer litigants, but that mixed forms of private ADR and public adjudication may be effective in "creating value" in some cases).

4. *See, e.g.*, Howard v. Drapkin, 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (2d Dist. 1990) (a psychologist functioning as a court-appointed "neutral evaluator" granted judicial immunity); Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994) (court found court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, absolutely immune from damages).

5. See the suggested standards for court-annexed programs (intended primarily for state-court usage of mediation) in Center for Dispute Settlement and the Institute of Judicial Administration, National Standards for Court Connected Mediation Programs (1992).

6. *See* G. Thomas Eisele, *The Case Against Mandatory Court-Annexed adr Programs*, 75 Judicature 34 (1991).

7. *See* Carrie Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 Alternatives 129 (1993).

8. Even in a court like the Northern District of California, with written guidelines and extensive training for its ADR neutrals—in other words, where substantial attention has been given to the kinds of problems that can arise—a recent case arose concerning information disclosed during an ENE process. *See* GTE Directories Serv. Corp. v. Pacific Bell, 135 F.R.D. 187 (N.D. Cal. 1991).

9. *See, e.g.*, John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 Denver U. L. Rev. 499 (1989).

10. For some efforts to project how court systems will have to become more responsive to the needs of the public and the changing problems presented by an increasingly diversifying and technical society, see the work of the futures commissions of many state courts, e.g., Justice in the Balance 2020: Report of the Commission on the Future of the California Courts; Reinventing Justice 2022: Report of the Chief Justice's Commission on the Future of the Courts, Massachusetts, 1992; Voices of the People, 80 A.B.A. J. 74–83 (May 1994).

Differentiated Case Management Can Help Make ADR More Than an "Intermediate Irritating Event"

david w. mckeague

All case-management techniques, including ADR, are a form of "intermediate irritating event," designed to encourage attorney attention to and evaluation of the case. These techniques often result in settlement of cases; the question is whether these events provide enough benefit in the form of earlier partial or total settlements to justify the cost to all litigants who are required to participate (or as the lawyers generally say, to "jump through that hoop"). In the Western District of Michigan we have developed a system that helps the court select each "intermediate irritating event," including ADR, wisely and thereby make each one a beneficial event for the parties. The mechanism is the differentiated case-management system (DCM), which the court was required to implement as a demonstration district under section 104(b)(1) of the CJRA. Through DCM, the court obtains substantial information at an early stage in the case, thus enabling the judge to determine, with the parties, how the case should be managed and whether ADR should be a part of the process.

Under the CJRA, the court's DCM program must specifically provide for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and time frames for the completion of discovery and for trial. The CJRA also requires all district courts to consider incorporating ADR programs, including early neutral evaluation, or ENE, into their civil justice expense and delay reduction plans. It gives no guidance as to how to integrate DCM and traditional forms of ADR, however.

A key to effective case management in the Western District is a meaningful early scheduling conference. The district's plan goes beyond the mandate of the federal rules and requires a judge to hold a Rule 16 scheduling conference in person or by telephone within forty-five days of the filing of the last responsive pleading. Before the conference, the parties are required to file a joint status report, which provides preliminary information to help the assigned judge determine whether the case is suitable for ADR and what the type and timing of ADR should be. Initial experience indicates that these early scheduling conferences and joint status reports permit a careful cost–benefit analysis of ADR assignment that is not possible when cases are assigned to ADR solely by nature of suit or monetary value.

Table 1
Referrals to ADR before and after DCM

	Filing date between Sep. 1, 1991, and Aug. 31, 1992	Filing date between Sep. 1, 1992, and Dec. 31, 1993
All civil cases eligible for ADR	844	823
Civil cases referred to ADR	242 (28.7%)	173 (21.0%)
referred to mediation	183 (21.7%)	160 (19.4%)
referred to arbitration	59 (6.9%)	6 (0.7%)
referred to ENE	0 (0%)	7 (0.9%)

The additional information about each case now available to the judge through DCM permits individualized consideration of the following five key factors in deciding whether the benefits of ADR justify the costs.

Nature of the issues. An early scheduling conference lets the court make a probing analysis of the true nature of a particular dispute, which often remains obscure under traditional notice pleading. (The civil cover sheet, form JS-44, indicates the type of suit, but reveals little about the issues.)

If the focus of the dispute is on legal issues, the judge will ordinarily give highest priority to the filing and resolution of dispositive motions. If resolution of the dispute turns on facts, or if the damages claimed lead to widely divergent estimates of the value of the case, a cost–benefit analysis will most likely indicate that ADR should be given a high priority. By making a thorough analysis of the case, the judge usually can determine whether there is sufficient expertise within the court's ADR panel to provide effective assistance to the parties or whether the issues appear to be too complicated for resolution through ADR.

As a result of this close examination of the issues in each case, the number of cases referred to ADR during the first year of DCM has slightly decreased; there also has been a substantial shift from arbitration to mediation and, to a lesser extent, to ENE. (Part of the decrease in cases referred to arbitration clearly is attributable to reduced use of mandatory court-annexed arbitration.) See Table 1.

Attitude of the lawyers and the parties. In the joint status report, counsel must recommend whether the case should be referred to ADR and which process would be appropriate. At the scheduling conference, the judge is then able to evaluate both the lawyers' recommendations and the real motivations for these recommendations. The court's ex-

perience suggests that a significant number of lawyers who recommend ADR in the joint status report do not recommend it out of any real commitment to the process, but instead choose the ADR method they find least objectionable because they believe the court will force them into ADR. Furthermore, lawyers vary greatly in their ability both to evaluate the merits of their cases and to convince their clients to act on the basis of their evaluations. Experienced lawyers and clients appear to have less need for ADR, particularly where they have a track record of previously settling cases without court involvement. By using DCM to weed out those cases in which either the lawyers or the parties are only going through the motions, the court hopes to increase the rate of acceptance of the ADR outcome.

A discussion of what is really motivating the parties at an early scheduling conference also can help identify those cases where a continuing relationship between the parties favors ADR and, conversely, where there are precedents at stake or corporate policies that substantially reduce the value of ADR to the parties. These conferences also permit the court to educate lawyers or parties who do not regularly practice or do business within the district about the differences between the various ADR methods available in the district.

Length and complexity of the case. Although many judges contend that no case is too complicated for ADR, this district's experience with DCM suggests that referrals to ADR are directly related to the anticipated length and complexity of the case. Table 2 shows that 64% of the cases assigned to the standard track are referred to ADR. The percentage of cases referred to ADR decreases substantially for simple cases expected to take a shorter time to resolve and for more complex cases expected to take a greater time to resolve.

Length of trial. In the joint status report, lawyers are required to estimate the time it will take to try their case. Because counsel uniformly overestimate trial time, these estimates often change substantially after a more thorough discussion of the issues at the scheduling conference. Most judges in the district have concluded that an early firm trial date should be set for cases they determine should not take more than one or two days to try, and these cases should be tried rather than referred to ADR. This cost–benefit analysis will differ substantially, of course, in those districts where heavy trial dockets cause significant delays in trying civil cases.

Will the case settle anyway? There clearly appear to be certain cases that, because of the culture in each district, seldom go to trial regardless of the case-management or ADR technique employed by the court. In some districts these may be fela cases; in others, as in the Western District of Michigan, they may involve claims under erisa for employer contributions to welfare benefit plans. Whatever the type of case in a particular district, there seems to be little cost–benefit justification for referring these cases to ADR unless requested by the parties.

Conclusion. There are many possible "intermediate irritating events" that can and do prompt settlements long before they would otherwise naturally occur. The court's task is to make these events as meaningful as possible and to make sure their benefits exceed their costs in each case. The DCM program in the Western District of Michigan enables the court to make a more thorough evaluation of the feasibility and desirability of ADR at an early date. The use of early scheduling conferences to discuss the issues and merits of each case, including the feasibility of ADR and the assignment of cases to tracks, is hardly a revolutionary idea, but over the past three years it has altered ADR usage and patterns in the district.

Table 2
Referrals to ADR by DCM track, for cases filed between September 1, 1993, and December 12, 1993

		Referred to ADR				
DCM track	Total assigned to track	Referred to mediation	Referred to arbitration	Referred to ENE	Total ADR referrals	Percentage of total track referred to ADR
Voluntary expedited	6	1	1	0	2	33%
Expedited	93	32	0	6	38	41%
Standard	176	106	5	1	112	64%
Complex	25	12	0	0	12	48%
Highly Complex	4	0	0	0	0	0%
Non-DCM	69	9	0	0	9	13%
Total	823	160	6	7	173	

The Arguments For and Against Mandatory Arbitration

During the past two years there has been a growing debate about the value of mandatory arbitration programs, engendered by the pending sunset of legislation establishing the present ten mandatory and ten voluntary pilot arbitration courts (28 U.S.C. §§ 651–658). The Center asked two judges who have been participants in this debate to state the case for and against mandatory arbitration. They exchanged their initial statements and each had an opportunity to revise or modify his statement as desired.

in support of nonbinding, presumptively mandatory arbitration for modest-sized contract and tort cases in some federal courts

wayne d. brazil

Whose values should drive the debate about court-annexed arbitration? Institutionally selfish concerns about reducing pressures on dockets should play no role. Rather, arbitration programs must stand or fall on how they serve the values and interests of the consumers of judicial services, i.e., the parties themselves. Because in some circumstances only a presumptively mandatory arbitration program can meet significant needs of smaller-case litigants, it is very important that district courts be able to establish such programs.

Before turning to those needs, I want to make clear what I am advocating. It is *not* the notion that every district court needs or should be compelled to establish an arbitration program. There may be some courts in which an arbitration program would add little. But courts should have discretion to establish a presumptively mandatory arbitration program if they determine that it would deliver to clients, in specified kinds of cases, important services otherwise not likely to be delivered under current conditions.

It also is important to identify essential characteristics of the arbitration programs I am defending. They are designed thoughtfully, with full input from the bar and client groups. The arbitrators are well qualified and specially trained, and the program is monitored to assure quality control. The outcomes (awards) are nonbinding. The rules impose no penalties whatsoever on any party's exercise of its right to trial de novo, and they prohibit disclosing the outcome of the arbitration to either the assigned judge or the jury. The rules also require that the arbitration hearing be scheduled as early in the pretrial period as the parties' essential information needs permit and that every case that emerges unresolved from arbitration have the same place in the trial queue that it would have had had it not been sent to arbitration. In addition, the programs presumptively compel inclusion only of contract and tort cases whose real value does not exceed $150,000, so none of the classes of cases of special political sensitivity, e.g., civil rights, are involuntarily assigned to the program.

Moreover, the assignment of cases to arbitration that I advocate is *only presumptively mandatory, not mandatory per se.* Cases that fit objective criteria are assigned to arbitration when filed, but parties may ask that their case be removed from the arbitration track. The court considers such requests with an open mind and grants them when compelling participation would not deliver net benefits to the parties—e.g., when a trial will be necessary no matter what the parties learn through the arbitration process. We have such a program in the Northern District of California, where, over its fifteen-year life, more than 20% of the cases assigned to the arbitration track have been removed from it.

What are the most important needs that arbitration programs can meet for modest-sized tort and contract cases? At least in many larger metropolitan courts, an arbitration program offers smaller cases their only realistic opportunity for a trial-like hearing. Because the economic value of such cases often cannot justify the money and time required for full pretrial and trial adjudication, the choice in the real world for these kinds of cases is not between jury trial and arbitration, but between arbitration and no hearing at all. In many courts, the only economically viable alternative for these cases is simply settlement—through negotiations privately conducted by lawyers, often with little or no participation by clients. Independent studies show that smaller-case clients (noninstitutional) often feel profoundly alienated by this process.[1] Unlike an arbitration hearing, the typical small-case settlement process gives clients no opportunity to tell their side of the story to a knowledgeable neutral, to see a presentation of the other side's view of the case, to learn from the neutral's questions and reactions, and to receive a judgment. Thus our courts provide

Judge Brazil's comments continue on page 16

in opposition to statutory or local rule amendments to the seventh amendment, i.e., in opposition to mandatory arbitration in any case

william r. wilson, jr.

Amendment VII to the Constitution does not read, "In suits at common law . . . the right of trial by jury shall be preserved, . . . *but, for little folks, it shall be preserved only after they have incurred the cost of an administrative procedure.*" The italicized part does *not* appear in the Seventh Amendment. I apologize for being so elementary, but this calls to mind a story told by Judge Myron Bright of the Eighth Circuit. A lawyer was arguing a case before Judge Bright and other members of a three-judge panel. He started his argument by stating, "This is a contract case—a contract involves an offer, acceptance, and at least a peppercorn of consideration." One of the panelists interrupted the lawyer and told him that he could assume the judges knew basic contract law. The lawyer replied, "That's the mistake I made in the lower court."

Mandatory arbitration does not comport with the Seventh Amendment, nor, in my opinion, with the due process clause, if due process is defined as "traditional notions of fair play and justice." (While mandatory arbitration is the subject of this debate, the issue facing the courts and Congress is considerably broader, as is discussed later in this article.)

Before debating whether mandatory ADR is "good" (by popular vote of some of those who have experienced it), wouldn't it be meet and proper to determine whether this procedure squares with the federal Constitution? Proponents of mandatory arbitration—even those who argue that the result should be "presumptively final"—will admit only that it "arguably implicates the Seventh Amendment." [1]

Those who supported H.R. 1102 last year relied heavily on the "local option" feature.[2] This may have a populist appeal, but I submit that no federal judge in America should be permitted to amend the Seventh Amendment by local rule. I am satisfied beyond peradventure that mandatory arbitration does have severe Seventh Amendment "implications." How can one argue that it does not impinge on the right to trial by jury when a party is told that she *must* undergo arbitration before she can have a trial by jury?

Please understand that mandatory *arbitration* is only a part of the vision of the future. Mandatory ADR is the umbrella which covers a whole "smorgasbord of dispute resolution mechanisms"[3] supported by the Federal Judicial Center and others. At the ADR Institute, workshop leaders urged participating judges to consider requiring parties to undergo more than one of these mechanisms (early neutral evaluation, mediation, summary jury trial, mini-jury trial, mandatory settlement conference, arbitration). Proponents argue that running the entire gauntlet would never be required by any judge. We can be assured of this only if the sun is allowed to set on the current mandatory arbitration pilot projects.

Even assuming mandatory arbitration does not run afoul of the federal Constitution, is this a good program for the federal courts? I say no, a thousand times no. Why should any party be forced to run an administrative gauntlet before receiving her trial by jury or to the court? Why should Article III judges become administrators rather than judges? If arbitration—and the other administrative devices—are engrafted onto the federal court system, this will be the inevitable result. At the ADR Institute, we were told to get ready for this change in our role.

While proponents argue that the results will be nonbinding, this is not necessarily correct, as a practical matter. The expense of the administrative procedure may force a party to accept the result, despite the fact that theoretically she has the right to go on to a real trial.

The fact remains that trial by jury is the quintessential example of government reposed in the people, and this venerable institution should not be cast away lightly.

Judge Wilson's comments continue on page 17

obviously second-class justice to smaller-case litigants when we relegate them, through lack of options, to this common version of the "settlement track."

Because nonbinding arbitrations clearly can deliver more than settlements that are privately negotiated by lawyers (i.e., more cross-party communication, more direct access to more reliable evidence, more opportunity for catharsis, more feedback from a neutral professional about the merits of claims and their value, and more "process satisfaction"), it is significant that studies of costs and expenses do *not* show that dispositions reached through nonbinding arbitration programs are likely to be appreciably more expensive than dispositions reached through settlements negotiated without arbitration.[2] If overall costs to litigants of these two routes to disposition are about the same, nonbinding arbitration is an extremely attractive alternative.

When we shift from a comparison of nonbinding arbitration and settlement to a comparison of nonbinding arbitration and trial, we find that well-run arbitration programs can provide litigants with a meaningful equivalent of a day in court that arrives much earlier than a trial (at least in many major urban courts) and indisputably costs the litigants appreciably less than a formal trial would. (The data about cost that some critics point to as inconclusive compare disposition through arbitration versus settlement, *not* disposition through arbitration versus trial.) In my court, for example, the median time between filing the complaint and trial is some ten to twelve months longer than the median time from filing the complaint to an arbitration hearing. And the earlier the hearing, the earlier counsel focus on the file and attend carefully to the needs of their clients. Moreover, our arbitrations are typically relatively short (lasting less than one day), well focused, and efficient—avoiding some of the costs that can be occasioned by the greater procedural rigidity and formalism of the trial process.

Equally as important, extensive studies by the Federal Judicial Center and others show that very high percentages of lawyers and clients (80% to greater than 90%) whose cases have been assigned *involuntarily* to arbitration programs endorse them and perceive them to be fair (see, e.g., the Meierhoefer study cited in note 2). Most such lawyers and clients also believe that assignment to an arbitration program saves time and money. And when asked in the ten-district Federal Judicial Center study which mode of disposition they would prefer, taking into account time, cost, and fairness, appreciably more of the clients and lawyers whose cases had been *involuntarily* assigned to these programs picked arbitration than trial (either to a jury or a judge).

One additional finding from the studies supports the view that arbitration programs can meet the need for "a day in court" that often is not met for smaller cases by trial: a much higher percentage of cases assigned to the arbitration track stay alive through the hearing stage compared with the percentage of civil cases generally that stay alive through the trial stage.

Given the strong endorsements that nonbinding arbitration programs in federal courts have received, why is it necessary to make participation presumptively mandatory? Why is it true, as experience in many settings has shown, that only a small percentage of the cases that are likely to benefit from programs like these will end up in them unless the *court* generates much of the momentum and takes the onus of initiation off of counsel? Unfortunately, there is a long list of psychologically real (but substantively empty) barriers to volunteering a case out of the conventional litigation track and into arbitration, even when it is nonbinding. To volunteer a case into arbitration, all parties must agree, but when one party suggests participation, the others are likely to suspect that some ulterior search for advantage inspires the suggestion. The many other barriers to volunteering cases into arbitration include ignorance, misinformation (including a tendency to equate the newer federal court programs with the old image of private binding arbitration, which many litigators perceived as slow and likely to yield an intellectually dishonest "compromise" award), inertia (comfort with doing things in well-established ways), fear of the new and the unknown, fear of loss of control (surely an illusion in litigation) over the process and over inputs to or from clients, fear that suggesting ADR might make counsel appear short of resolve, fear that recommending a procedure not compelled by rule needlessly creates a "target" for a disgruntled client's later second-guessing or even for a malpractice action, and reluctance to give up the fee-generating potential of traditional litigation.

Given these formidable barriers, it is hardly surprising that to ensure delivery of the benefits of arbitration to a large number of potential beneficiaries it is necessary, at least at this point in our history, for courts to initiate the arbitration process in appropriate cases.

Notes to Judge Brazil's remarks

1. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 953 (1990).

2. Barbara Meierhoefer, Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center 1990).

judge wilson
the arguments against, *continued*

If Congress wants to fund an ADR program forum from taxpayer dollars, fine. But let it be a voluntary program, and one that is not annexed to the federal court system. We should not bog the courts down with unnecessary administrative work.

Contrary to the assertion of the proponents, the sky is not falling down. Federal dockets, as a general rule, are not clogged, and the system is not facing meltdown or gridlock. These myths are relied upon by proponents when urging Congress to set up a massive bureaucratic ADR program within the federal court system. While a few federal districts have serious docket problems, this is the unusual case, and any problems can be solved by simple measures, such as sending in extra judges for a period of time.

There is no crisis. As Judge Eisele reports, the actual figures reflect that the number of cases per federal judge has decreased dramatically during the last decade. Let me say this again: *The number of cases per federal judge has decreased dramatically during the last decade.*

It is extremely important also to understand that there are no objective studies—none—reflecting that the mandatory ADR districts resolve cases faster or better than the "traditional districts— i.e., those that resolve unsettled cases by trial to the court or jury. In fact, Professor Kim Dayton of the University of Kansas School of Law has written two law review articles on this point.[4] These articles document her research, which reveals that during fifteen years of experimentation, mandatory court-annexed arbitration has demonstrated that it is ineffective and unfair and that there is no empirical support for the glowing reports on the pilot projects.

It is a privilege to debate an opponent as talented and fair as the Honorable Wayne D. Brazil. Give him a good set of facts, and I would cut and run rather than debate.

Notes to Judge Wilson's remarks

1. Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Resolution*, 46 SMU L. Rev. 1905, 1921 (1993).

2. In the 1993 congressional session, the House of Representatives passed H.R. 1102, which required all district courts to establish by local rule the use of mandatory or voluntary arbitration. In the final days of the session, however, the House accepted a Senate bill that simply extended until Dec. 31, 1994, authority for the existing twenty pilot courts to conduct court-annexed arbitration.

3. G. Thomas Eisele, *Differing Visions —Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. Rev. 1935, 1939 (1993).

4. Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 Iowa L. Rev. 889 (1991); Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U. S. F. L. Rev. 445 (1992).

Two ADR Administrators Reflect on Developing and Implementing Court-Annexed Programs

genevra kay loveland

The district courts in the Northern District of California and the District of Columbia have been in the forefront of developing and implementing innovative ADR programs. Within the past five years, these courts have hired three-person teams, consisting of a director, deputy director, and administrative assistant, to manage their programs on a day-to-day basis.[1] Although both courts are unusual because of the significant resources they have been able to commit to their programs, other courts may benefit from their experiences in dealing with many of the issues and concerns that arise in developing ADR programs.

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In a joint interview, Stephanie Smith, director of ADR programs in the Northern District of California, and Nancy Stanley, director of dispute resolution for the D.C. Circuit (she administers the ADR programs in both the district court and the court of appeals), discussed what they have learned in establishing and managing their courts' programs.

The D.D.C. program is voluntary, i.e., the parties' consent must be obtained before any case is assigned to ADR. Stanley noted that the programs in the district court in the District of Columbia started in 1989 and were among the relatively few ADR programs that preceded enactment of the CJRA. After they had been in operation for several years, the court's CJRA committee, which was convened in 1991, recommended that they be expanded and that ADR be made mandatory for some cases. The court ultimately rejected this option, partly out of a concern that, in an era of declining judicial resources, it would not be able to secure adequate staff to supervise an expanded program.

In Northern California, cases meeting certain criteria have been referred automatically to arbitration or ENE, a "presumptively mandatory" referral at the time of filing. In July 1993, Northern California began a new ADR multioption pilot program.

In this program, which is being tested by five judges, counsel and clients are urged to select from among five ADR options: mediation, ENE, arbitration, early settlement conference with a magistrate judge, or private ADR. If the parties have not stipulated to an ADR option within approximately ninety days after the case is filed, counsel participate in a phone conference with the director or deputy director of the ADR program to discuss the available options in the context of their case.

According to Smith, "the presumption of the multioption program is that parties in most cases should try one ADR approach early in the life of the case. If the parties cannot agree on an ADR choice or if one or more parties believe that no form of ADR is likely to be helpful or cost-effective at that stage, they discuss these issues with the assigned judge at an early case-management conference. The judge then decides whether or not the case will be referred to an ADR program." Smith observed that this hybrid approach between presumptively mandatory referrals and judicial encouragement of voluntary consent may ultimately result in courtwide implementation of a new case-selection process, developed in conjunction with attorneys on the court's CJRA advisory panel.

The two administrators stressed that it is important for courts to "start small," even if they have the resources for a larger program. Smith commented that Northern California "has added ADR options slowly, largely through the use of small, tested pilot programs." ADR began with a nonbinding arbitration pilot program in 1978 and was supplemented by an ENE pilot program and expanded use of magistrate judges as settlement masters in the mid-1980s. "Courts should start small," she said, "because they need to see what works in their community. It is better to have fewer cases in the program and deliver a higher quality service."

In the exchange that follows, Stanley and Smith discuss other issues that their courts faced in planning and implementing ADR programs.

What do you mean when you say your court has an "ADR program?"

Smith: In our court, the program consists of an array of ADR options that the court as an institution has endorsed and offers within a courtwide administrative structure. ADR, as we define it, includes both settlement assistance and case-management assistance. One ADR process, the magistrate judge settlement conference, is conducted by judicial officers. The other three court-sponsored ADR processes (arbitration, mediation, and ENE) are conducted by attorney neutrals who are selected, trained, and supervised by the court.

Stanley: Institutional involvement is what's key here. We wouldn't call a single judge's practice of referring cases to a special master for settlement purposes an "ADR program." But a practice or group of practices that a court has endorsed in some official way—by adopting a rule or promulgating procedures or by notifying the bar that a program exists—*is* an "ADR program," even if not every judge participates.

What were your courts' goals in setting up their ADR programs?

Stanley: The D.C. District Court's objective in launching its program in 1989 was not just to control its docket or to reduce its caseload. An equally strong motive was to offer a service to litigants—help in assessing and settling cases—that they might find useful and that might not otherwise be available.

It's important, by the way, to underscore the point that is implied by your question: that before a court launches an ADR program, it should decide what its goals are.

Smith: Northern California's goal was the same. The primary motivation was to provide better service to litigants by reducing cost and delay in civil cases and, hopefully, producing better outcomes in some cases. Better outcomes can include assisting the parties to develop creative solutions that a judge could not order, such as a new joint venture in a business case, a product-licensing agreement in a patent case, or an individualized benefits package in an employment termination case. Of course, reducing cost and delay to litigants also has a positive impact on court cost and delay.

What had to be done to set up your programs? What was the process?

Stanley: The dispute resolution program in our court was strongly supported from the very beginning by then-Chief Judge Aubrey E. Robinson, Jr., and by the new District of Columbia Circuit Executive, Linda Finkelstein. Linda had been the director of the multidoor program in the local court system before she came to the D.C. Circuit, and she was extremely enthusiastic about her experience there. She and Judge Robinson believed a similar program might work well in the federal district court.

Our programs began slowly, with five district court judges agreeing to send cases to ENE or mediation if the parties consented. There were other key steps: (1) the court adopted procedures governing the operation of the programs; (2) the court hired an outside consultant who talked to each participating judge about what was involved and which cases might be appropriate for referral; (3) the Administrative Conference of the United States secured a grant to help the programs get started; and (4) the court selected its first group of mediators and then a second group of evaluators and trained the volunteers to perform the service. Training for mediators consisted of a two-day program taught by a team of outside experts; the early neutral evaluators were trained in a half-day session featuring Magistrate Judge Wayne Brazil from Stephanie's court, who spoke to the volunteers about Northern California's ENE program. The court began with two different techniques—mediation and ENE—to give litigants access to more than one ADR option.

An important feature at the outset was the degree to which individual judges were involved in assessing cases for "ADR potential" and then encouraging litigants to consent to referral. Judge Robinson believed that judicial involvement on this level would give the ADR program instant credibility with litigants. He also thought it would increase judicial interest in the program and, ultimately, judicial support if the judges began to see the impact ADR could have on their own cases. His view has been borne out. Although we began with only five judges, today all the judges participate.

Smith: ADR programs succeed only with strong leadership from the bench and the support of the bar. Northern California's late Chief Judge Robert F. Peckham inspired and guided the development of our ADR program. The court had been a federal pilot site for court-annexed arbitration since 1978, but Judge Peckham felt more could be done. In 1982, he convened a task force of leading local attorneys and charged them with identifying barriers to settlement and effective case management and proposing ADR solutions. Wayne Brazil, then a law professor and now a magistrate judge in our court, was the reporter for this task force.

The task force thought there were many barriers to cost-effective case management and settlement that could be alleviated by an appropriately designed ADR process. With this in mind, they designed the court's ENE program to address a number of issues— including the tendency of lawyers to defer attention to cases until close to trial, the absence of early, effective communication of facts and legal theories across party lines, and the need for early, realistic assessment of cases. They also proposed expanded use of magistrate judge settlement conferences. After testing the ENE model through two small pilot programs, evaluated by an outside consultant, the judges of the district approved the program for courtwide use.

Nancy Stanley, director of dispute resolution for the D.C. Circuit

With the continuing leadership of Chief Judge Thelton Henderson and Magistrate Judge Brazil, who supervises the ADR program, the district has slowly expanded its ADR options. As a CJRA demonstration district, our court received money to hire staff to administer and improve the ADR program. Mediation and the multioption pilot program grew out of the recommendations of the CJRA advisory group, which worked with the judges, particularly Magistrate Judge Brazil, and my office in designing our present program. A hallmark of the district's program is that we continue to experiment, test, and improve the ADR options offered by the court; for that reason, we spend a significant amount of time in policy development, studying and trying to fine-tune the ADR experiments we have in place.

Stephanie Smith, director of ADR programs in the Northern District of California

Stanley: Stephanie is absolutely right about the importance of judicial leadership and support from the bar. I've already mentioned former Chief Judge Robinson's role in starting our programs. The bar was also very helpful. Although we didn't canvass lawyers as a group or set up a task force, we knew that lawyers in the community would be receptive because they had embraced the multidoor program in the D.C. Superior Court. Court-annexed ADR was "in the air," so to speak, and the bar was ready for a federal court program.

How do you decide which cases to target, both as a policy question and in particular cases, and who makes the decision?

Stanley: Our view, programmatically, is that virtually *any* civil case may have ADR potential. We encourage judges and litigants to look at each case individually with that in mind. They are the ones who "target" a case for referral to the program.

Of course, over time we've learned to ask judges and lawyers to consider certain factors: whether the parties have an ongoing relationship; whether they are represented by lawyers who are receptive to ADR; and whether the lawyers differ strongly on the legal merits of the case. Contrary to what most people say about ADR, we think that complex cases in which the parties have a range of interests are often better ADR candidates than cases that involve "only money." We're also bullish on class actions. In the EEO area, for instance, we've found that class action cases are sometimes easier to mediate than individual claims.

Finally, we ask people to think about whether a negotiated settlement is more likely to resolve their dispute than judicial action. This is often true of environmental cases, where people litigate for years over questions of process—for example, whether the environmental assessment was adequate—but where the real question is whether a particular project will be built and, if so, whether it can be modified to make it environmentally acceptable.

The bottom line, though, in spite of what I've just said, is that we try not to make too many categorical assumptions. Every case is different, and we encourage people to look at each one individually.

Smith: Based on the pilot studies of ENE, certain subject-matter areas were selected as most likely to benefit from the process. With increased experience, we have come to see that most ADR techniques have the potential to benefit a broad range of cases. In the most recent independent study of the ENE program, consultants hired by the court concluded that there was no reason to limit ENE or any other ADR process to certain subject-matter categories.

In the ADR multioption pilot, we are making a range of ADR options available to cases in a broad array of subject areas. We hope that the studies of the multioption pilot will teach us more about whether there are factors that the parties and the court can identify that suggest which ADR process can be of greatest assistance in a given case.

How do you determine whether your programs are having the effect you intended?

Stanley: Our mediators and evaluators routinely file reports with us on how the process worked in particular cases. Routine feedback from litigants has been harder to get. Recently, though, the Administrative Conference of the United States contracted with an outside consultant to evaluate our programs. The survey will include feedback from the parties. We'll be very interested in seeing these results, since litigant satisfaction is one of our goals.

Smith: During the ENE pilot phases, there were questionnaires and interviews with neutrals, counsel, and clients. Since 1988, we have received regular feedback from the evaluators.

With funds available under the CJRA, we were able to hire outside consultants to review a large number of ENE cases from the years 1988 to 1992. The consultants sent questionnaires to counsel, parties, and evaluators and supplemented those responses through the use of interviews and focus groups. An article discussing their results will be published in the *Stanford Law Review* in the fall of 1994.

We are currently working with the fjc to develop questionnaires for counsel, clients, and neutrals who are participating in the multioption pilot and plan to use a variation on these forms as part of an ongoing data collection effort after the fjc study is completed.

Your courts are fortunate in having substantial resources for ADR. What should courts with fewer resouces concentrate on?

Stanley: There are several things to focus on. The first is to actively involve the judges, early on, in the conception and design of the program. This is really important. Without judicial support and interest, it is hard to start a program, hard to establish its credibility among interested players—like the U.S. Attorney's Office—and hard to maintain its momentum as it matures.

A second key step, if the court plans to rely on volunteers to mediate and evaluate its cases, is to select and train them carefully. The training should be the very best the court can afford. This is vital, because no matter how good a program looks on paper, in the last analysis its success or failure depends on the quality and effectiveness of the people who do the actual work—the volunteer mediators or evaluators.

The third step, if the court has the money, is to hire someone to administer the program who has some background in ADR. That person should monitor the work done by the neutrals to make sure it is of high quality, and he or she should be available to them as a resource when they run into problems. Some of these problems can be quite sensitive—for example, difficult ethical issues may arise during an ADR proceeding—so it's hard to overstate the importance of the administrator's job.

Smith: I agree with Nancy that ensuring the quality of neutrals is crucial. It is the single most important thing a court should do. If the court establishes its own ADR panel, it is important to spend adequate resources on training.

Courts also need an in-house administrator to monitor the program on a daily basis and to be responsible for quality control. What the qualifications should be for that administrator depend on the type and size of the ADR program and the scope of the administrator's responsibilities. Our court's program involves multiple ADR options, most of them staffed by largely volunteer lawyers who need to be selected, trained, and supervised. As in Nancy's program, we serve as a resource on the conduct of the various ADR processes, ethical issues that arise, and, of course, administrative issues. In addition, in our phone conferences with counsel, our deputy director and I learn about the legal claims and the procedural and discovery posture of the case, and we explore with counsel the potential benefits of the various ADR processes for their case. Because of the nature of our responsibilities, both ADR and legal training have been critical to the performance of our jobs. Whatever the background of the ADR administrator, he or she needs to be able to work effectively with the judges and the bar, as well as with the ADR neutrals, the clerk's office, and chambers' staff.

Both courts have used members of the bar as volunteer mediators and evaluators. How has that worked? What is the bar's reaction to your ADR programs?

Stanley: We had an enthusiastic response from the very beginning from lawyers who wanted to serve as volunteer mediators or evaluators. That enthusiasm hasn't abated; we have hundreds of applications on file from people who want to be included in our next training class so they can be added to the court's roster. On the user side, lawyers have been more skeptical. They still don't automatically think of using ADR in their own cases. But that attitude is changing, and we're very encouraged by the growing interest in ADR processes.

Smith: We have been fortunate to have many talented attorneys willing to volunteer for our panels. We, too, have far more applicants than spaces in our programs. We had over 200 applications last summer for our first thirty-five mediation positions.

I look forward to the day when the majority of lawyers

understand ADR and integrate these techniques into their practice. In our ADR phone conferences, a significant number of attorneys are quite sophisticated in their understanding of ADR options. One of our goals is to increase that sophistication level for counsel and their clients. Things have changed a lot in just the last five years. Clients increasingly expect their counsel to be skilled not just at trial techniques, but in effective case-management and settlement techniques, including both direct negotiation and ADR.

What do each of you see in the future for your programs?

Stanley: I would like the program to handle more complex civil cases. One of our biggest successes a year or so ago was a $38 million settlement that one of our volunteers mediated in a class-action employment discrimination case. Employees had sued the company, a local utility, alleging race and sex discrimination in hiring, promotions, and other activities. The case had been pending for years but was referred to mediation only two weeks before trial. Our wonderful volunteer took it on and settled it, and you can imagine how pleased we were. I think there are many large cases like this, including some public policy cases involving the federal and local governments, where we could be helpful, and I'd love to see more of them in the program.

Smith: The multioption pilot is our effort to experiment with a model the court might consider for the long term, providing an array of options as efficiently as possible. We think it may be the best way to match cases to processes.

Where we will be in five or ten years depends on the results of our various experiments and the financial support that will be available for the courts to support these types of programs. The creative possibilities are tremendous; the challenge is to figure out what works best and how to fund it on a broad basis.

Notes

1. As a demonstration court under the CJRA, Northern California received funding for staff to administer its ADR programs, which it has expanded under the CJRA. The district is also one of the ten mandatory arbitration pilot courts established under 28 U.S.C. § 651. In the District of Columbia, where the district court's ADR programs together with the court of appeals mediation program are administered by the circuit executive's office, ADR staff salaries and most program costs are paid from appropriated funds allocated to the executive's office.

Survey reflects variation among ADR administrators

As more courts develop and implement ADR programs, a number of them have created ADR administrator positions. To learn more about their work and experience, the Center conducted a telephone survey of administrators of court ADR programs in eight districts: N.D. Cal., D.D.C., W.D. Mo., E.D.N.Y., S.D.N.Y., N.D. Ohio, W.D. Okla., and D. Utah. (Since the time of the survey, we have learned that the District of Rhode Island recently appointed an ADR administrator.) The observations of one administrator, who met his counterparts at the ADR Institute, sum up the survey findings: "There is great variation in titles, salary grades, background, responsibilities, and staff support provided."

Seven of the eight administrators are attorneys, but their backgrounds vary widely: Litigator and attorney trainer in a private law firm and volunteer mediator/arbitrator (N.D. Cal.); litigator in a variety of government agencies and private practice and volunteer mediator (D.D.C.); thirty-year litigator in a small firm (W.D. Mo.); associate counsel and director of arbitration for an international commodities company (E.D.N.Y.); litigator and managing attorney of a law firm (S.D.N.Y.); associate in a law firm and experience in nonprofit administration, program development, and volunteer placement (W.D. Okla.); litigator and law clerk to a state supreme court justice and an appellate judge (D. Utah). The one non-lawyer administrator (N.D. Ohio) developed strong managerial skills as administrative assistant in the federal public defender's office and office manager of a law firm. Most of the administrators were hired since the enactment of the CJRA.

Staff support ranges from administrators who have no staff (E.D.N.Y. and D. Utah) to those in four courts who supervise two staff members (N.D. Cal., D.D.C., W.D. Mo., S.D.N.Y.).

Four administrators report to the clerk of court (E.D. N.Y., S.D.N.Y., N.D. Ohio, D. Utah); in four courts judges have direct authority over the administrators (N.D. Cal., N.D. Ohio, W.D. Okla., W.D. Mo.). One administrator is part of the circuit executive's office (D.D.C.). Three administrators play a significant role in the annual budget process (N.D. Cal., S.D.N.Y., N.D. Ohio).

Additional survey data are set out on page 23.

The Center's telephone survey of ADR programs in eight district courts revealed the following information about program types and the titles and duties of those administering the programs.

District	Program types	Administrator's title	Administrator's duties
N.D. Cal.	ene, mediation, mandatory arbitration, multioption adr pilot program (parties may select from mediation, ene, arbitration, early settlement conference with magistrate judge, or private adr)	director of adr programs	confers by telephone with counsel regarding adr options, prepares memos of recommendations to judges for case-management conferences, maintains list of neutrals and assigns them to cases, oversees training of neutrals and evaluation and monitoring of programs, participates in program design, speaks to and works with bar associations and other groups and individuals interested in the court's programs
D.D.C.	mediation, ene	director of dispute resolution for the D.C. Circuit (also oversees the mediation program for the U.S. Court of Appeals for the D.C. Circuit)	participates in selection of neutrals and assigns them to cases, confers by telephone with counsel regarding their cases and programs generally, oversees progress of cases through program and confers with neutrals throughout process, mediates some cases, supervises training of neutrals and monitors program effectiveness, participates in program design, speaks to and works with bar associations and other groups and individuals interested in the court's programs
W.D. Mo.	early assessment program, mediation, voluntary arbitration, ENE	administrator of early assessment program	coordinates selection of cases for early assessment program, conducts early assessment meeting, assists counsel in selecting appropriate adr method, mediates cases, prepares and disseminates list of neutrals to parties, designates time period for conducting process, prepares status reports, speaks to bar groups
E.D.N.Y.	mediation, ENE (the court also offers mandatory arbitration, but the administrator has no role)	ADR administrator	assists judges and counsel in selecting appropriate cases and adr method, maintains list of neutrals and assigns them to cases, works with parties and neutrals to answer questions and ensure process runs smoothly, interviews candidates for the court's roster of mediators and ene neutrals, prepares status reports, oversees training, speaks to bar groups
S.D.N.Y.	mandatory mediation	civil case manager and general counsel to clerk of court	designates cases for mediation and supervises process, oversees training of mediators, maintains list of mediators and assigns them to cases, tracks cases and prepares status reports
N.D. Ohio	ENE, mediation, voluntary arbitration, settlement week	ADR administrator	maintains and disseminates list of neutrals to parties, oversees and coordinates training of neutrals, confers with counsel regarding selection of neutrals and sometimes designates neutrals for cases, oversees progress of cases through phone calls and correspondence, responds to questions from bench, bar, and neutrals regarding adr processes, prepares status reports
W.D. Okla.	mandatory arbitration, mediation	ADR program administrator and law clerk to settlement magistrate judge	attends scheduling conferences with judges and counsel, works with counsel to choose appropriate adr method, reviews applications for mediation and arbitration panels, oversees recruitment and training of panels of neutrals, participates in program design, prepares status reports, speaks to bar groups
D. Utah	voluntary arbitration, mediation	ADR administrator	designates appropriate cases for judges' attention at scheduling conferences, attends scheduling conferences, oversees training and work of neutrals, maintains and disseminates list of neutrals to parties, works with neutrals to schedule time and place of sessions, prepares status reports, advises neutrals on liability and ethics matters, disseminates information to bar and public

Evaluating and Monitoring ADR Procedures

donna stienstra

Courts considering for the first time whether to adopt an alternative dispute resolution procedure are often frustrated by a lack of good information about whether ADR "works." Courts that already have ADR programs in place often face a different frustration—lack of information about whether their particular ADR procedure is working. In addition, policy makers who wish to consider broad policy questions related to ADR often lack adequate empirical information to assist their deliberations. In response to these problems, individual courts and others have begun to consider how to collect more and better information about how ADR works and what its effects are.

Recognizing the need for good information is, of course, far easier than collecting it. To carry out a sound and reliable data-collection project requires careful planning at the outset and close attention throughout. This may seem a daunting task to courts whose resources are already taxed. Yet the reward for carefully planned evaluations can be a wealth of information useful not only to the individual court undertaking the evaluation but also to others who need to know more about the effects of ADR.

How, then, can a court collect useful information about its ADR procedures? It may be helpful to think about this process as having three principal tasks: identifying the appropriate data, preparing the data collection methods, such as questionnaires, and establishing the evaluation design, or the road map for collecting the data.

Identifying the appropriate data

While it is tempting, when conducting an evaluation, to ask for information on many aspects of the litigation process, an evaluation can quickly go off track if a court does not have a good idea of what it needs to know. To narrow the possible choices—and to make certain that all necessary information is obtained—a court should look to the nature and purpose of its ADR program. What is it supposed to accomplish for the court? What is it supposed to do for the litigants? For example, if the purpose of a court's mediation program is to save litigant costs, time to disposition—though interesting—is the wrong information to use when assessing the program's impact. The more explicit a court has been at the outset in defining the purpose of its ADR program, the more guidance it will provide to those who have to determine whether the program is working.

Equally important, a court should consider very carefully the different dimensions of the effects it wants to measure. Litigant costs, for instance, may be thought of solely as the number of dollars spent on fees and other legal expenses, but this narrow focus excludes other costs, such as absence from work or emotional toll of the litigation process, that may of equal significance to litigants. Similarly, in programs that seek to reduce litigation delay, a court must determine whether it needs to measure the actual number of hours spent (by judges, attorneys, or whomever) or the time that elapses between stages of a case (e.g., from filing to disposition).

Preparing the data collection methods

Once a court has determined what to measure, it may find that several different types of data collection methods are needed. Some ADR effects, such as time to disposition, can be evaluated through routinely collected caseload statistics, but others may best be evaluated by questionnaires or interviews that ask those involved in the ADR procedure how they think it's working. Still other effects, such as delay, may best be measured through both methods. Some concepts—quality of justice, for instance—simply may not be measurable at all, at least not by standard data collection methods.

Designing the data collection instruments themselves is another important aspect of an evaluation. Questionnaires are one of the most frequently used methods because they're inexpensive relative to the amount of information obtained, but they present many pitfalls and should be used carefully. They are generally used when one wants to generalize about a population—for example, attorneys who litigate in the district—and such generalization is risky if response rates are low or questions are imprecise. (To feel more confident of questionnaire results, courts should consider working with someone trained in designing questionnaires who can help craft questions.)

Courts should not overlook the usefulness of other methods, such as focus groups, which are helpful when generalization is not needed, or collecting information from dockets. Finally, it is very important to decide on data collection methods early, even as the ADR procedure is designed, so that important information is not lost. Some evaluations may require information that is not routinely collected, such as the identity of the mediator or arbitrator or the names and addresses of litigants with cases in mediation, and new docketing procedures may have to be developed to record such data.

Establishing the evaluation design

Although data collection tools are important, they are more useful if guided by an overall evaluation design that tells court personnel when and how to use them. Evaluations of new programs are generally of two types: evaluation of program *implementation* and evaluation of program *effects*. To evaluate implementation, a court would look at how its program is used. Do judges and parties submit cases to the procedure, or is it ignored? If other litigation activities are to be tolled, does this in fact happen? For this type of evaluation, the court might examine the dockets in a sample of cases to identify just what happens in these cases.

If a court can assume that successful implementation—that is, faithful use—necessarily leads to the desired effects, evaluation of program implementation may be sufficient. But if this assumption cannot be made, or if the court wants to understand whether the program has other unanticipated effects, it will need to conduct an evaluation of effects as well. Ascertaining what effects were caused by the program or procedure necessarily requires a basis for comparison. For instance, data showing that cases in the program take an average of nine months from filing to disposition do not reveal whether the program has increased or decreased disposition time—or had an effect on it at all. What is needed is some idea of what these cases' average time to disposition would have been absent the program.

The best design for making such a determination is to compare a group of cases not subject to the program, a "comparison" or "control" group, with a group of cases subject to the program, an "experimental" group. In this design, every case eligible for the ADR program is randomly assigned to one or the other of these two groups. This means all cases are exposed to the same conditions *except for* the ADR program, which is applied only to the experimental cases. If after following this procedure the court finds a difference between the two groups on some measure—average disposition time, for example—it can infer that the program had an effect. (For guidance on the ethical considerations of using experimental designs in court settings, see *Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law* (1981), available on WESTLAW as well as from the Center.)

A number of courts have used random assignment to determine the effectiveness of their ADR procedures, and any court planning an evaluation should at least consider using this design. An assessment that relies on some other kind of comparison group—say, a comparison of cases terminated before the program began with cases terminated after going through the program—may reflect influences other than those of the program. For instance, there might be a change over time in the type of cases filed or a difference in the economic conditions in which they were litigated. Random assignment accounts for those influences and therefore permits more powerful conclusions about the causal effect of an ADR program.

While comparisons are critical for making causal inferences, they are reliable only if apples are compared with apples. A common error is to compare cases selected for a program to cases not selected, where the selection relies on judicial or staff discretion rather than random assignment. For example, when judges are called on to select suitable cases for an arbitration program, they will choose cases they believe are amenable to arbitration and leave cases they consider less suitable to be resolved by other means. Comparing these two groups of cases, which are clearly different, will not give reliable conclusions about the effect of arbitration.

One final point: Decisions about overall evaluation design and data collection methods are linked, and neither should be made without considering the other. For example, asking attorneys for their subjective assessments of cost savings is an unreliable measure of the impact of an ADR program on litigation costs. The quality of these subjective evaluations can be enhanced, however, by combining random assignment of cases with an objective question to all attorneys about litigation costs: "What were the fees and costs for this case?" By comparing the answers of attorneys whose cases were and were not subject to the ADR program, the court would obtain a far better measure of the program's impact on costs than by addressing subjective questions only to the attorneys subject to the program.

In undertaking evaluations of their ADR programs, courts should keep in mind that just as these programs have their own unique context and purposes, so may their evaluation approaches differ from others. Further, courts may find it helpful to use experts from sources like the Center's Research Division or local colleges and universities. Whatever the approach used, ensuring quality dispute resolution services requires that those adopting ADR understand the effects of their programs. This information, when shared with others, will also help build a body of knowledge that will enable us all to assess the costs and benefits of ADR for the courts and litigants.

Federal Court-Annexed ADR: After the Hoopla

d. brock hornby

I leave to others whether ADR is the late twentieth century's best solution for reducing costs and delay and restoring citizens' faith in an overburdened civil justice system—or whether, on the other hand, it is an insidious attack on the jury system, a bulwark of our freedoms for centuries. Enthusiasm among significant numbers of litigants and, increasingly, lawyers guarantees that at least some forms of ADR are here for the foreseeable future; and the CJRA has resulted in a number of federal courts annexing ADR programs because they are pilot or demonstration courts or because their CJRA committees have persuaded them to do so. It is time, therefore, to consider carefully the practical issues implicit in federal court-annexed ADR.

Federal court management of ADR

An important issue for any new district court program is management. In many districts, federal judges are inexperienced in ADR and insecure about their abilities to perform it or assign cases to ADR programs; worse, they are sometimes indifferent or outright hostile to the whole idea. Yet any respectable model of a court-annexed ADR program assumes that someone will take charge of administering the program, with responsibilities such as compiling lists of qualified people who can conduct ADR; monitoring their performance; handling complaints, ethical and otherwise, about them; doing empirical evaluations to determine the overall success of ADR; and generally taking whatever steps are necessary to ensure quality control. Without assurances that these functions are properly performed, court-annexed ADR may do more harm than good.

Who, then, should be chosen to perform these duties? We could assign the clerk of court. But in even a moderately busy district, does he have time to add this responsibility to his agenda? If he does, does he have the credentials to evaluate the performance of people who may be acting as quasi-judges? Will he have the prestige or clout to recruit volunteers of high caliber to do the job, call them to account if they don't perform, or make the program work in the face of judicial indifference or hostility?

If the clerk is not up to these tasks, you say, then perhaps the chief judge of the district should be responsible. After all, the chief judge is already in charge of hiring the chief probation officer and the clerk of court; why not add an ADR administrator or ADR neutrals to these hiring duties? We need to consider this option carefully because it may result in a substantial increase in the chief judge's burdens, particularly at the outset of ADR programs while they are in an experimental stage. Unlike probation officers and clerks of court, whose professional credentials and qualifications are by now reasonably well defined, in many districts there is no established universe of ADR professionals from whom to choose an administrator or, I venture to say, ADR neutrals.

Adding these new hiring and supervision duties to the list of a chief judge's responsibilities emphasizes the question that the Long Range Planning Committee must already consider in connection with governance issues: What will be expected of a chief judge in the year 2000? Currently, our chief judges need not have any kind of administrative credentials. Of course, a chief judge could delegate ADR tasks if she were fortunate enough to have a magistrate judge like Wayne Brazil of the Northern District of California or John Wagner of the Northern District of Oklahoma. Oftentimes, however, there will be nobody available with that kind of experience or skill.

I don't know the answer to this management question. Imposing any significant new responsibilities such as these on the clerk's office, judges, or, especially, chief judges may well exacerbate the difficult governance issues already facing some federal courts at the local level.

Education

New programs require new education. Several groups of users and participants require specialized education if ADR is to be successful. First, we must educate those persons who will actually perform ADR. They may be judges or magistrate judges, volunteer lawyers in private practice, or paid professionals who have emerged from a variety of disciplines. Second, we must train those who will assign the cases to ADR. They may be judges, administrators hired specifically for this job, or current deputy clerks, who must learn to recognize which cases are not suited for trial and how to determine which ADR process would help the disputants achieve greatest satisfaction at the least cost and delay. Third, we must train lawyers. Certainly, over the past half dozen years lawyers have become more acquainted with ADR; it is refreshing not to draw blank stares now when it is mentioned. Nevertheless, many lawyers still harbor a good deal of hostility and misunderstanding about ADR and often lack knowledge of the range of alternatives they might employ for their clients' benefit.

Typically, federal judges' training only occasionally fo-

cuses on settlement. In the recent past, excellent presentations have been made at Federal Judicial Center training sessions by the late Judge Alvin Rubin of the Fifth Circuit and Judge (then Magistrate Judge) Claudia Wilken of the Northern District of California. Primarily, however, settlement by judges has been a matter of instinct, with hints gleaned from insightful practitioners like Rubin and Wilken. Anyone who has studied interest-based mediation knows that far more than instinct is required for success in that art form.[1] And I have not yet heard of a program that would educate judges in how to decide which cases to send to ADR and which form of ADR to choose. Clearly, there will be an increasing need to train administrators, judges, and clerks in how to administer ADR programs, to educate judges or other personnel in how to choose the cases to send to different types of ADR, and to teach judges, lawyers, and other professionals how to perform a variety of ADR techniques, for which the skills required differ substantially. Finally, law schools, national continuing legal education organizations, or state bar associations must teach lawyers how to represent clients adequately in ADR contexts.

Budget

Everything I've mentioned so far, important as it is, pales in comparison to the budgetary issues. We can improve training and find a way to manage these programs, but what other programs are going to be sacrificed to pay for them? That is the only way to put the question, because today's budget realities provide no extra money to go around. The Administrative Office is rightfully proud of its success in decentralizing the budget, but the question is: Will there be room in these decentralized budgets for ADR? Dollars must be found to pay for administrators' salaries and, because volunteers will eventually run out, to provide compensation for those who actually serve as mediators, arbitrators, and evaluators, unless they are magistrate judges. Office space, supplies, and other overhead expenses must be covered as well.

This is a serious issue, as we should have learned from our experience with automation. Everybody knew automation would cost money for the hardware and software. Not so apparent at the outset were the ongoing expenditures that would be required to keep the system running—to hire systems administrators, train deputy clerks to implement the system, educate judges and others who must interact with it, and so forth. Although ADR is not a new technology, it will require new professionals and an important commitment of financial resources, undoubtedly with costs not yet contemplated. ADR may save the litigants money, but it will come at a cost to the taxpayers. Dare we ask whether Congress has considered this cost or will consider it in the context of appropriation requests?

The judge's role

"I didn't become an Article III judge to do administration. I signed up to preside at trials!" Sound familiar? Well, if you think that case management and the tax-like computations of guideline sentencing are beyond the pale, consider this: You no longer stand at the end of the process after the parties have tried everything else, failed, and come to you for a fair trial. Instead, you are at the *beginning* of the process: Parties file a lawsuit and then expect you to assist them in finding the best way to resolve their fuss. Jury trial is only one—often less preferred—option. Although that may sound flippant, I believe it reflects an underlying change in assumptions about the role of judges, who are no longer expected simply to try cases but to engage in what many of them may see as the "touchy-feely" work of dispute resolution.

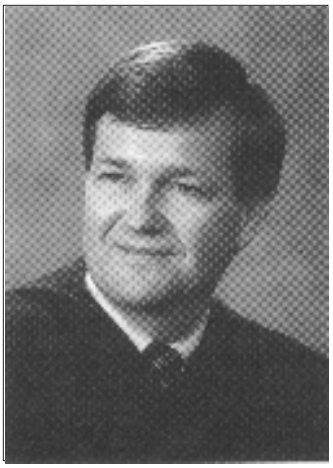
Interestingly, this change in role may be the toughest hurdle of all. But we must surmount it. Just as Ma Bell and the cable companies have concluded that their business is not telephones or television but information, we as judges must recognize that, in this changed litigation environment, a court's "business" is resolving disputes and the conventional trial is only one of many vehicles. The message for judges, therefore, is that one of our primary roles in the future will be to decide *where* disputes should go for resolution and, in most instances, to try to *avoid* trial. Only sometimes will a judge have the luxury of conducting an old-fashioned jury trial in a civil case.

Conclusion

At the ADR Institute, I said I was sad that judges would be less involved in civil trials. Obviously, that development is not going to happen overnight (except in drug-laden districts). But I think it is a pretty good forecast of the direction in which we are headed. As a result of rules changes over the past decade and the important consequences of the CJRA, the judge's role in litigation has altered substantially. There is a lot to be said in favor of this development. The judge as mere trial umpire is not—and should not be—our only paradigm. History and a variety of cultural traditions also reflect a role for judges broader than that of ivory-tower decision making; judges have often been the elders to whom their communities turned for a wide range of techniques to resolve disputes. In this respect, perhaps court-annexed ADR recalls a broader role for judges—just as lawyers increasingly are being asked to return to their more expansive roles as "counselors at law," rather than limiting themselves solely to an advocacy function.

If we do the job right, we should end up helping the system of justice. Although we judges have prided ourselves on forcing settlements on the eve of trial, developing empirical

research on procedural justice shows that, while we may have controlled our dockets that way, we have not increased American citizens' sense of justice. Instead, there is growing evidence that Americans feel better treated—even if they lose—by a system that gives some kind of fair hearing to their grievance, rather than one in which their lawyers, after closeting themselves with the judge, tell them (by telephone or in the hall) that they have to settle for a specific sum because the judge has recommended it. If ADR can give Americans the feeling that they have had a fair hearing of their dispute, that will be no mean accomplishment.



Hon. D. Brock Hornby (D. Me.)

We are left, however, with a new wrinkle on an old question: What is the primary function of a *federal* court? Traditionally, we have not dealt as often as the state courts have with the garden-variety disputes that would seem to be the bread and butter of ADR, but more frequently with difficult or complex controversies that involve judicial articulation of federal rights. Instituting a serious federal court-annexed ADR program implies that when Congress creates new federal rights—environmental rights, civil rights, or others—it contemplates that such rights can be adequately fostered and protected not simply through a conventional lawsuit with a determination on the legal merits, but also through mediation, early neutral evaluation, or other kinds of ADR approaches. Is this truly what Congress has in mind when it writes a private cause of action into a new federal statute? What guidance will Congress give us on *when* alternative dispute resolution rather than trial is an appropriate way to vindicate federal rights and resolve public policy disputes involving difficult issues such as pollution, sexual harassment, or violence against women? I'm not holding my breath for an answer.

Notes

1. Interest-based dispute resolution processes, such as mediation, seek to expand the legal discussion to include underlying interests and motivations, to deal with emotions and relationships, and to find creative solutions. In contrast, rights-based processes seek to narrow the issues, streamline the legal arguments, and predict an outcome based on facts and law. *See* Center for Public Resources, Judge's Deskbook on Court ADR 33 (1993).

Other activities and materials with a focus on alternative dispute resolution

The Federal Judicial Center continues to provide education on ADR issues to the courts. Thirty bankruptcy judges met in Washington, D.C., Aug. 29–31 to participate in a special-focus program on *Alternative Dispute Resolution in the Bankruptcy Court*. The program provided an overview of the spectrum of dispute resolution, as well as specific information on what ADR methods are currently employed in the bankruptcy courts. It had a roundtable discussion format, with each participant taking an active role in the program. The Center also sponsored an ADR implementation workshop Sept. 18–21 in Kansas City, Mo. District judges, magistrate judges, district clerks, ADR administrators, and other court personnel from twenty-three district courts, as well as attorneys representing CJRA advisory groups, were selected from among those who applied for the program. Most of the participants were involved in planning and implementing ADR programs in their courts. Representatives from courts with established programs shared their knowledge and experience in design, implementation, and evaluation. Panel discussions and small-group sessions dealt with planning for ADR, selecting cases, managing cases referred to ADR, working effectively with neutrals, ADR administrative structures, and evaluation of ADR programs.

Forthcoming in early 1995 is *Sourcebook on Federal District Court ADR*, a joint project with the Center for Public Resources. The sourcebook will describe, for each district, the ADR programs in use in that district. Substantial detail will be provided about each ADR program, including the kinds of cases eligible for and excluded from the program, the method of referral to ADR, whether fees are assessed, what type of neutral conducts the ADR session, the eligibility and training requirements for neutrals, and the number of cases referred to ADR in the past year.

Readers of this issue of *Directions* will be interested in the videotape *Mediation in Action: Resolving a Complex Business Dispute*, which demonstrates the use of mediation to resolve a contract dispute. The thirty-six-minute tape, produced by the Center for Public Resources, shows a highly skilled mediator using a variety of mediation techniques to assist the parties in reaching a successful resolution. It also shows how the parties' objectives may change during the process. CPR has made the tape available to the federal courts by placing a copy in each court library. Judicial branch personnel can also obtain a copy on loan from the Federal Judicial Center by contacting the Center's Media Library at One Columbus Circle, NE, Room 4-400, Washington, DC 20002-8003, fax 202-273-4207. Others may purchase a copy by contacting the Center for Public Resources/CPR Legal Program, 366 Madison Ave., New York, NY 10017, tel. 212-949-6490, fax 212-949-8859. The price to nonprofit organizations is $62.50.

about the federal judicial center

The Federal Judicial Center is the research, education, and planning agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars and special continuing education workshops.

The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing technology for information processing, education, and communications. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

The Publications & Media Division develops and produces educational audio and video programs and edits and coordinates the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Center's Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state–federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.

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